

Current position and general proposals

Proposals - Guidance on Imposition of Community Orders

1. Do you agree with the general principles for community orders? Please highlight any additional principles you believe should be included.

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The Prison Reform Trust welcomes this consultation and the clarity of the draft guidelines. There are a number of ways in which we think they can go further to achieve sentencing that is both more effective and fairer.

As recommended in our recent discussion paper "Sentencing of Mothers", we suggest that these overarching principles should include one that sets out the court's duty to investigate sole or primary caring responsibilities of defendants and to take these responsibilities into account in sentencing decisions. This would reflect the Court of Appeal decision in R v Petherick.

We suggest that it would also be helpful within these principles to re-assert that , for all offenders, previous failure to comply is not a ground for considering custody. The point might be added after the third paragraph.

We would also wish to add that reasons for non-compliance in relation to a previous community disposal should be sought – for example, it may be the inadequacy of the order or the inability of the individual to comply (due to disability/mental ill health/domestic circumstances) that resulted in non-compliance. One example known to us concerned a woman was breached for not attending a drug treatment requirement when her mental health problems were such that she was unable to leave the house.

There should also in our view be a general principle that CO requirements are adapted, as necessary, to accommodate any disability or other protected characteristic experienced by an offender, in accordance with the Equality Act. A more punitive response should not be imposed in the absence of suitably adapted CO requirements.

We welcome the Council's acknowledgement of the critical importance of considering the impact of sentencing on offenders with dependants, and recommend that sentences be reminded in these principles of the importance of ensuring that any community order takes into account the practical obstacles that someone in that situation may face if the requirements are not carefully tailored to their circumstances. This includes the setting of conditions relating to electronic monitoring, acknowledging that such monitoring may very often represent an appropriate and effective disposal.

The Sentencing Council have stated that mental illness or disability can be a mitigating factor and this should be highlighted and explained. Section 166, Criminal Justice Act 2003 makes provision for a sentencer to take account of any matters that 'in the opinion of the court, are relevant in mitigation of sentence' in relation to dealing with offenders who have a mental disorder within the meaning of the Mental Health Act – and this should be included.

In the light of the relevance of providing appropriate assistance to an offender to complete community penalties, we recommend amending the second sentence of the opening paragraph to read:

"In particular they have the effect of restricting the offender's liberty while providing punishment in the community, rehabilitation for the offender including any necessary treatment, care and/or support, and/or ensuring that the offender engages in reparative activities"

Finally, although it may not constitute a general principle, the Council should in our view take the opportunity to clarify within these guidelines the court's responsibility for ensuring the offender understands his/her CO requirements and the implications of non-compliance, taking into account any difficulties the particular individual may face in achieving that level of comprehension.

Proposals - Guidance on Imposition of Community Orders (continued)

2. Is the guidance on how to identify the level of community order clear? Please highlight any additional information you believe should be included.

Is the guidance on how to identify the level of community order clear? Please highlight any additional information you believe should be included.: In our view the guidance is clear but incomplete; the term 'exceptional circumstances' requires explanation and examples would be helpful.

The implications of a fine, especially for offenders in receipt on benefits, should be highlighted, and support for debt and money management made available whenever a fine is imposed. The easy read leaflet on how to pay a fine [Ref: HM Courts & Tribunals Service (Enforcements department) MC102, A guide on how and where to pay your fine] should be cited, and the attention of sentencers drawn to it

Examples of exceptional circumstances that might justify a community rather than a custodial disposal include factors relating to the particular vulnerability of the individual offender. These might include disability and mental health conditions or a learning disability. Another relevant example which is little understood concerns offenders from the Trans community, including non-binary offenders, for whom a custodial sentence may carry significant risks that may not be capable of successful mitigation in prison.

A further example of exceptional circumstances would include the impact of a custodial sentence on dependent children.

Finally, we would assert that the sentence's rehabilitative objective will almost invariably be undermined when an offender is sent to prison. It is well established

that community penalties have a better impact in terms of reducing reoffending than custody (Ministry of Justice 2013 Compendium of reoffending statistics and analysis, London, Ministry of Justice) , and a recent study specifically relating to women reinforces this finding for female offenders (Carol Hedderman & Darrick Jolliffe (2015): The Impact of Prison for Women on the Edge: Paying the Price for Wrong Decisions, Victims & Offenders: An International Journal of Evidence-based Research, Policy, and Practice, DOI: 10.1080/15564886.2014.953235)

In cusp cases, it is legitimate for the court to consider the damage that will be done to accommodation, employment and supportive relationships by any period of imprisonment, regardless of length, and to take into account the damage likely to be done to the sentence's rehabilitative impact by a decision to imprison.

Proposals - Guidance on Imposition of Community Orders (continued)

3. Is the list of requirements clear and comprehensive? Please highlight any additional information you believe should be included.

Is the list of requirements clear and comprehensive? Please highlight any additional information you believe should be included.:

The list is clear but not comprehensive. It should be made clear that each requirement may need to be adapted to accommodate offenders with a disability, in accordance with the Equality Act. This is especially important in relation to RARs as the court has no knowledge of the type or level of activity decided upon by the offender's responsible officer; it should not be assumed that the responsible officer will be either qualified to determine activity appropriate to the needs of the offender or appreciate what support is necessary. CO requirements that have not been appropriately adapted may result in breach. Should the necessary reasonable adjustments not be possible, the offender should not be at risk of being subject to a more punitive response, such as custody.

Proposals - Guidance on Imposition of Community Orders (continued)

4. Are the specific considerations to be made when determining requirements of a community order clear and comprehensive? Please highlight any additional information you believe should be included.

Are the specific considerations to be made when determining requirements of a community order clear and comprehensive? Please highlight any additional information you believe should be included.:

Please see our response to Q2. In relation to point iii) third and fourth bullet points: a reference to the Equality Act and legal requirement for reasonable adjustments should be made.

Proposals - Guidance on Imposition of Community Orders (continued)

5. Is the guidance on pre sentence reports and electronic monitoring clear and comprehensive? Please highlight any additional information you believe should be included.

Is the guidance on pre sentence reports and electronic monitoring clear and comprehensive? Please highlight any additional information you believe should be included.:

We are very concerned that practice in the preparation of pre-sentence reports has developed in a way that prizes speed over quality without sufficient regard to the circumstances where an unjust or inappropriate sentence may result. PSRs must support the court to take the correct decision first - speed is a secondary and not always complementary objective. Same day PSRs inevitably concentrate on the known offending history and circumstances of the matter before the court. That will not be sufficient to inform the court about the likely impact of a particular sentence in relation to its rehabilitative purpose, nor to identify any disproportionate impact in relation to vulnerable defendants or those with dependents. PSRs which lack the information to balance assessments of risk of serious harm and likelihood of reoffending with the other information the court requires in relation to both need and vulnerability, and a failure to prompt adjournments in the many cases where that is appropriate, risk introducing a cumulative bias against the rehabilitative purpose within sentencing.

Specific reference should be made in these guidelines to Liaison and Diversion services and their role in providing the courts with detailed information about a defendant's mental health problems, learning disability, autism, substance abuse and/or communication requirements. Reports from Liaison and Diversion services should be integral to a PSR, or a negative return noted. For offenders with support needs, a PSR completed on the same day is rarely appropriate and is unlikely to result in the most effective or efficient outcome. The inclusion of the text, 'where possible to ensure adjournments are avoided' is unhelpful in that it puts pressure on sentencers to proceed with less information than might be necessary or helpful. Section 10 of the Magistrates' Court Act enables a Magistrates' Court to adjourn a case after conviction so that enquiries can be made and/or to determine the most suitable method of dealing with the offender.

There should be a similar presumption in favour of an adjournment for the preparation of a full PSR whenever a defendant has dependent children, to enable the careful consideration both of whether custody is appropriate and, where it is not, of the ways in which a community penalty should be tailored to improve the chances of it being completed successfully.

We also recommend that the Council takes this opportunity to place within the guidelines an expectation that the court should take the offender's maturity into account, and for offenders aged from 18 - 24 should be assisted in doing so by always requiring a PSR for any offender aged 18-24, which in turn contains a mandatory maturity assessment. An assessment of maturity is relevant both to the tailoring of the sentence to the particular individual and, in "cusp" cases an absence of maturity should be considered a relevant vulnerability militating against custody.

Proposals - Guidance on Imposition of Community Orders (continued)

6. Do you agree with the structure and content of the flowchart for imposition of community orders? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

Do you agree with the structure and content of the flowchart for imposition of community orders? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.:

This is a helpful flowchart. A note should be added to say it is not comprehensive and should be read in conjunction with guidance.

We recommend a box should be added to the PSR with wording along these lines:

'I have concerns/no concerns about the offender's mental health; learning disability; autism; other needs or vulnerabilities (say what), and do/do not think further investigation or assessment is required.'

7. Do you agree with the overall proposed guidance on imposition of community orders? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

Do you agree with the overall proposed guidance on imposition of community orders? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.:

These guidelines are helpful but need to be expanded and made more explicit in relation to the issues we have highlighted in answer to questions 1 to 6.

The proposals – Guidance on Imposition of Custodial Sentences

8. Do you agree with the approach to imposing custodial sentences? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included in this section of the guidance.

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Subject to the need for expansion set out in our answers above, overall these guidelines represent a helpful clarification and reminder to sentencers.

However, in relation to the suggestion that custody might be imposed without a PSR, our view is that Section 156 Criminal Justice Act 2003 states that the court is required to obtain a PSR before imposing a custodial or community sentence. A PSR can help to determine the most suitable sentence for an individual offender. There should be no circumstances when the imposition of a custodial sentence does not require a PSR. See response to Q5 concerning the circumstances when it is inappropriate to complete a PSR on the same day as sentencing. Further, reports from Liaison and Diversion services should be integral to a PSR, or a negative return noted. In the absence of a report from Liaison and Diversion services, a medical report should be obtained if there is any suspicion that an offender is or appears to be mentally disordered (s157, Criminal Justice Act); there are limited exceptions to this, which should be listed in the guidance. For offenders with mental health conditions, autism, learning disability or other particular needs or vulnerabilities the greater harms of imprisonment, and inadequacy of the prison system to deal effectively and humanely with these individuals, should be considered and, wherever possible/appropriate, a community order imposed.

In point 2), first bullet point: it would be helpful to offer an explanation, with examples, of 'offender mitigation' and/or reference where relevant information can be found.

The proposals – Guidance on Suspending Custodial Sentences

9. Do you agree with the approach to suspending custodial sentences? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included in this section of the guidance.

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The guidelines need to be clear that even if the custody threshold is passed, a suspended sentence is not appropriate if other factors including disability, dependants, vulnerability and lack of maturity would tip the balance against custody in the particular case. A suspended sentence must never provide a substitute for making the necessary enquiries to pass a community sentence that is appropriate and meets the requirements of sentencing across the board.

The proposals – Guidance on Suspending Custodial Sentences (continued)

10. Do you agree with the overall proposed guidance on imposition of community and custodial sentences? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included.

Do you agree with the overall proposed guidance on imposition of community and custodial sentences? Please give your reasons if you do not agree and/or highlight any additional information you believe should be included. :

We are confused by the reasoning in vi) which produces disproportionately long periods of suspension. We would recommend that the period of suspension should match the length of the appropriate custodial sentence - i.e. 6 months suspended for 6 months, 12 months suspended for 12 months. The degree of jeopardy for offender looks unreasonable as it stands and is likely to produce breaches long after the offence has been committed.

If a sentence is suspended, the offender must understand the implications of non-compliance – and this is especially so for individuals with learning disabilities, autism and certain mental health conditions.

General comments

11. Please provide any additional comments or suggestions that you have about the proposals.

Please provide any additional comments or suggestions that you have about the proposals.:

We welcome these guidelines as a much clearer and more succinct basis for decision making.

We are concerned that their impact could be undermined by current practice, particularly in relation to the preparation of PSRs, which places a priority on the

speedy conclusion of proceedings to the detriment of both fairness and economy. Decisions to imprison taken in the absence of information to support proper assessments of the offender's particular characteristics are both less likely to achieve their rehabilitative impact and more likely to be unjust. They are also likely to represent a significant additional pressure on public funds in the long term, regardless of any short term savings to the court or those who service it.

We urge the Council to take this opportunity to remind sentencers through examples of the variety of relevant characteristics which should always affect their decision in cusp cases, including the existence of dependent children, mental health concerns and learning disability, vulnerability of different kinds and maturity (or the lack of it). We particularly commend the recommendations in our recent discussion document on the sentencing of mothers to the Council (Sentencing of mothers: Improving the sentencing process and outcomes for women with dependent children. A discussion paper. Shona Minson, Rebecca Nadin and Jenny Earle. Prison Reform Trust 2015. ISBN: 978-1-908504-98-2).

Finally, we hope the Council will take the opportunity to ensure that guidelines reflect the importance of all defendants being able to take a full and informed role in proceedings that affect them, with account taken of their ability to understand and communicate effectively, and requirements made of them which they have a reasonable ability to fulfill. We believe such an approach will assist in building public confidence in a range of community penalties which can more effectively meet the full range of sentencing objectives than the short custodial penalties which too often supplant them.